(3)

No. 95-1621

In The

Supreme Court of the United States

October term, 1995

HARBOR TUG AND BARGE COMPANY, INC.,

Petitioner,

v.

JOHN PAPAI AND JOANNA PAPAI,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF INDUSTRIAL INDEMNITY COMPANY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

ROGER A. LEVY
Counsel of Record
J. MARK FOLEY

LAUGHLIN, FALBO, LEVY & MORESI
Two Embarcadero Center, Fifth Floor
San Francisco, California 94111
(415) 781-6676

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

MOTION FOR LEAVE TO FILE BRIEF OF INDUSTRIAL INDEMNITY COMPANY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

Industrial Indemnity Company respectfully move for leave to file the attached brief *amicus curiae* in support of the petition for certiorari in this case. The consent of the attorney for petitioners has been obtained. The consent of the attorney for respondent was requested but refused.

Industrial Indemnity Company is a major underwriter of employer risk insurance in west coast markets. Among other things, it insures state workers' compensation risks, United States Longshore and Harbor Workers' Compensation Act[1] (hereinafter "LHWCA") risks, and the various employer risks attendant to the Jones Act[2] and the general maritime law of the United States. Industrial Indemnity Company has a strong interest in promoting the swift, fair, and consistent resolution of employee claims brought against its insured employers.

This case presents two questions, the answers to which are determinative of employee status vis-a-vis the Jones Act and the LHWCA. The first concerns application of 'mutual exclusivity' to employee injury claims made under both the Jones Act and the LHWCA. The second concerns the 'fleet seaman' doctrine. The Ninth Circuit answered both in its own unique way. In short, the Ninth Circuit held that a prior determination of employee status made by an Administrative Law Judge in an LHWCA

---

[1] 33 U.S.C. §§ 901 *et seq.*

[2] 46 U.S.C. § 688.

trial is not binding on the parties in subsequent litigation. The Court also held that, in determining seaman status, the trier of fact shall examine, if necessary, the employee's work for any number of pre-injury employers. In so holding, the Ninth Circuit embarked, in the first instance, on a course reciprocal from that taken by this Court and the Fifth Circuit; and, in the second instance, on a course tangential to that taken by this Court just last year.

We submit that the Ninth Circuit has strayed well off-course in both instances. In electing to stand into danger, it has declined to follow well reasoned decisions of the Second and Fifth Circuits . It has relegated administrative decisions to a backwater existence. It has also suggested that seamen now carry their status on their backs, regardless of the nature of their employment at the time of injury.

These issues are important to *amicus curiae* because they affect both underwriting and claims handling practice for hundreds of its insureds. At best, maritime employers will now be forced to litigate these claims in two forums with the full knowledge that claimants get a free swing under the LHWCA. This can only increase the cost per claim. At worst, all employers in the Ninth Circuit will be forced to purchase insurance that will respond to Jones Act claims, simply out of fear that they might unknowingly hire a seaman. Or, on the other hand, employers will face a different liability if they refuse to hire seamen.

The course taken by the Ninth Circuit in this case will increase the cost of doing business for both underwriters and employers affected by its decision. At the same time, the Ninth Circuit has invoked a rule that has no effect on the injured worker's net recovery. The Ninth Circuit's course is counterproductive, wasteful of judicial resources and contrary to law.

Amicus curiae therefore submits that the Court should grant the petition and resolve both the intercircuit conflict and the conflict with decisions of this Court by adopting the approach of the Second and Fifth Circuits regarding the preclusive effect of LHWCA proceedings and by reaffirming this Court's seaman status test announced just last year.

Respectfully submitted,

ROGER A. LEVY
Counsel of Record
J. MARK FOLEY
LAUGHLIN, FALBO, LEVY & MORESI
Two Embarcadero Center, Fifth Floor
San Francisco, California 94111
(415) 781-6676

July 26, 1996

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES CITED:

STATUTES CITED:

BRIEF OF INDUSTRIAL INDEMNITY COMPANY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

INTEREST OF THE *AMICUS CURIAE*

The interest of the amicus curiae is as set forth in the motion accompanying this brief.

STATEMENT OF THE CASE

This case arises out of a maritime personal injury. John Papai was a day worker hired by Petitioner Harbor Tug & Barge Co. to work for one day painting its tug POINT BARROW while she lay alongside at Alameda, California. Mr. Papai was injured when he fell from a ladder while painting the vessel.[1] He subsequently filed a claim with the United States Department of Labor, Office of Worker Compensation Programs, seeking benefits available under the United States Longshore and Harbor Workers' Compensation Act[2] (hereinafter "LHWCA"). Mr. Papai also decided to seek recovery for his injuries

---

[1] See the opinion below, *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203 (9th Cir. 1995) and Decision and Order of the United States Department of Labor, August 27, 1992, Case No. 92-LHC-403, reprinted as Appendix G to Petition for Writ of Certiorari (Papai's LHWCA case) (Pet. App. G).

[2] 33 U.S.C. §§ 901 *et seq.*

under the Jones Act[3] and the general maritime law[4] by filing suit in the United States District Court. In order to pursue these seaman remedies, Mr. Papai had to claim that he was, in fact, a seaman.

As has been repeatedly noted by this Court, recently in *McDermott International, Inc., v. Wilander,*[5] (*Wilander*), and in *Southwest Marine, Inc., v. Gizoni,*[6] (*Gizoni*), and most recently in *Chandris, Inc. v. Latsis,*[7] (*Latsis*), and as was intended by Congress when it excluded masters and members of the crew from coverage under the LHWCA,[8] the two remedial schemes pursued by Mr. Papai are mutually exclusive. The problems herein arose when, after an LHWCA trial before an Administrative Law Judge, it was determined that Mr. Papai was **not** a seaman,[9] and therefore eligible for LHWCA benefits. In Mr. Papai's companion District Court case, Judge Legge reached the same conclusion and dismissed Mr. Papai's seaman causes of action. The Ninth Circuit, in reversing the District Court, reinstated Mr. Papai's seaman causes. In the interim, Mr. Papai received LHWCA benefits and the decision of the Administrative Law Judge became

---

[3] 46 U.S.C. § 688.

[4] These include claims for maintenance and cure (benefits paid regardless of fault) and claims against PT. BARROW and her owner for unseaworthiness.

[5] 498 U.S. 337 (1991).

[6] 502 U.S. 81 (1991).

[7] ___ U.S. ___, 115 S.Ct. 2172 (1995).

[8] 33 U.S.C. § 902(3)(g).

[9] Pet.App. G, pp. 34a-37a.

final. To date, there has been no appeal from the Decision of the Administrative Law Judge.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD ACT TO PRESERVE THE MUTUAL EXCLUSIVITY OF THE RESPECTIVE REMEDIAL REGIMES AND RESOLVE THE CONFLICT BETWEEN THE CIRCUITS

Both the Jones Act[10] and the LHWCA are remedial regimes designed to affect compensation for injured workers. When coupled with the various state workers' compensation programs, they provide coverage for employees ashore, at sea and while on the waterfront. As was noted most recently by this Court in *Latsis,*[11] Jones Act remedies and the remedies available under the LHWCA are mutually exclusive. One can be a Jones Act seaman or one can be a maritime worker covered under LHWCA, but not both. The question presented herein is "what event triggers the mutual exclusivity between these regimes?"

The Ninth Circuit has approached this issue with 20-20 hindsight. That is, mutual exclusivity is triggered

---

[10] Hereinafter, the term "Jones Act" will be used generically, describing the panoply of remedies available to seamen. These include the payment of maintenance, cure and unearned wages, remedies available regardless of fault, and the fault based civil remedies of negligence and unseaworthiness.

[11] "As the Court has stated on several occasions, the Jones Act and the LHWA are mutually exclusive compensation regimes . . . " at 115 S.Ct. 2183.

only after a Court of competent (general) jurisdiction makes a final determination of status. All else is prelude. The Ninth Circuit's facile response to this issue is that there is mutual exclusivity as long as there is no double recovery. In other words, as long as Mr. Papai's potential Jones Act verdict can be reduced by the LHWCA benefits previously paid, all is well. *Amicus curiae* would urge this Court to grant the writ in order to adopt the views expressed by the Fifth and Second Circuits on this issue. In *Sharp v. Johnson Bros. Corp.*[12] and in *Hagens v. United Fruit Co.*,[13] both Circuits concluded that a determination by an Administrative Law Judge of coverage under the LHWCA is dispositive of the claimant's status as a non-seaman and that such determination precludes the pursuit of a Jones Act case. This is a more reasoned approach to the issue. It gives effect to the administrative proceedings and promotes judicial economy. Further, it provides incentive to the parties to the LHWCA proceeding to bring the matter to conclusion in a timely manner.

It is doubtful that Congress considered mutual exclusivity to be reducible to an arithmetic calculation. Rather, it is more likely that Congress was mindful of the trade-off made between employer and employee in the LHWCA and virtually every other workers' compensation regime. Maritime workers covered by the LHWCA were granted no-fault benefits in exchange for bestowing on employers immunity from suits for damages. The Ninth Circuit's opinion below in effect allows a claimant

---

[12] 973 F.2d 423 (5th Cir. 1992).

[13] 135 F.2d 843 (2d Cir. 1943).

to collect no-fault compensation while pursuing a suit for damages.

Amicus curiae is in the business of insuring employers for risks imposed by the compensation regimes discussed above. It has, through its insurance policies, contractual relationships with its insureds. Its business livelihood depends, in part, on its ability to administer and adjust employee injury claims in an efficient and economic manner. This ability is adversely impacted by the rule imposed by the Ninth Circuit in this case. This rule imposes unnecessary overhead on the compensation system, an obvious example of which is the cost associated with Mr. Papai's Jones Act claim. In order to protect their insureds, *amicus curiae* must litigate all Ninth Circuit LHWCA claims that present the possibility of a subsequent Jones Act case. Below, the employer and employee herein were forced to take opposite positions in each forum, simply in order to put status in issue. This is wasteful.[14] It is far more sensible to accord finality to a determination of LHWCA coverage as made by the Administrative Law Judge.

Presently, the LHWCA provides a maximum weekly compensation rate of $782.44.[15] In practice, LHWCA carriers (*amicus curiae*) and employers often reach lump sum settlement agreements with LHWCA claimants.[16] With this high compensation rate, these settlements frequently

---

[14] As the Appendices to the Petition reflect, both employer and employee were forced to retain different counsel, from different firms, for the LHWCA and Jones Act actions.

[15] 33 U.S.C. § 906.

[16] 33 U.S.C. § 908(i).

involve large sums. It is now quite difficult to secure such settlements in the Ninth Circuit, as any such payment would not produce a final disposition of all claims between the parties. In fact, such a settlement would have the opposite effect. It would fund the Jones Act litigation. Further, LHWCA employers are frequently insured by multiple carriers, with different carriers on the LHWCA and Jones Act risks. While application of credit may be as routine as the Ninth Circuit suggests, reimbursement between the carriers may not be. Rather, this duality of insurance fosters conflict, dispute and even more litigation, rather than automatic reimbursement. What sounds simple in theory is actually quite complex in practice.

Lastly, the Ninth Circuit has created a situation where a bona-fide injured employee could lose on the status issue in both the civil and LHWCA arenas and thereby be deprived of any benefits for a clear work related injury. In order to avoid this harsh result, certain maritime workers will now file claims in yet a third forum seeking state workers' compensation benefits.[17] This will further increase the administrative and judicial burden as well as the system overhead.

II. SEAMAN STATUS IS NOT PORTABLE

Amicus curiae submit that the second prong of the opinion below is sufficient, unto itself, to warrant granting the Petition. As noted by Judge Poole in his dissent in the opinion below, the Ninth Circuit has modified this

---

[17] In many cases, this will result in the retention of a third set of lawyers in the case.

Court's test for seaman status, as enunciated in *Gizoni* and *Latsis*, to the extent that it no longer requires "an employment related connection to a vessel in navigation." As matters now stand, all that is required is a 'prior employment related connection to a vessel.' This expansion of the fleet seaman doctrine to include, within the 'fleet', vessels owned by prior, different employers has the potential of exposing land-locked employers to Jones Act liability.

The 'fleet seaman' doctrine finds its genesis in the river trade of the Midwest, where short voyages allowed owners to assign seaman to different tugs and towboats on an almost daily basis. In order to avoid the harshness of the "more or less permanent connection to a vessel in navigation" test set forth in *Offshore Co. v. Robison*,[18] the Courts fashioned the fleet seaman test to accommodate seamen who owed an allegiance to a fleet of vessels rather than to one particular vessel. See *Guidry v. Continental Oil Co.*[19] and *Barrett v. U.S.A. Chevron, Inc.*[20] However, in each instance, the 'fleet' was under common ownership or control.

Now, for the first time, the Ninth Circuit instructs that plaintiff's employment with prior employers is relevant to the seaman status test. The 'fleet' has been redefined to include all the vessels owned by all the different employers that hire workers from the employee's union. This leads to the conclusion that,

---

[18] 266 F.2d 769 (5th Cir. 1959).

[19] 640 F.2d 523 (5th Cir. 1981).

[20] 781 F.2d 1067 (5th Cir. 1986) (en banc).

unless a new employment situation amounts to a permanent change of status, the seaman carries his seaman status on his back from job to job. This regardless of the nature of work performed for the new employer.

Around the turn of the century, employers and employees bargained away certain rights in order to bring about workers' compensation regimes in most states. Among the rights bargained away was the employees' right to sue the employer for damages for work related bodily injury. In return, employers agreed to compensate employees for work-related injuries, regardless of fault. The decision of the Ninth Circuit in this case undermines the very core of this bargain, by restoring the right to sue to certain employees. This new group of favored employees are those who were once seamen and who continue to work out of the same union.

Under this new 'fleet seaman' test, there is no requirement that the employee have a work-related connection to a vessel for his current employment. For example, under the Ninth Circuit analysis, Mr. Papai would still be eligible for seaman status if he had been employed by a sub-contractor hired by Harbor Tug & Barge Co. to paint PT. BARROW. To continue the example, if the painting sub-contractor hires day workers out of Mr. Papai's union, Mr. Papai would be eligible for Jones Act status. The painting sub-contractor need not own or control a single vessel, for, under the new Ninth Circuit rule, it would be deemed to have some undefined form of ownership or control of the various vessels belonging to the other employers that hire out of the same union.

Amicus curiae submit that this unwarranted expansion of the fleet seaman doctrine can and will produce harsh results. Employers will not hire seamen for short duration non-seafaring jobs, jobs exactly like the one Mr. Papai was doing for Harbor Tug & Barge Co., simply because they will be unwilling to risk exposure to claims in multiple forums. In this day and age, with the American Merchant Marine in decline and with the foreign flagging and crewing of American vessels, the maritime industry does not need a further burden to employment. Nor does it deserve increased liability exposure.

CONCLUSION

The Ninth Circuit, with its opinion below, is on a different tack, sailing away from the rest of the fleet. For the reasons set forth above, this Court should grant Harbor Tug & Barge Co.'s Petition for a Writ of Certiorari.

Dated: July 25, 1996

Respectfully Submitted:

ROGER A. LEVY
Counsel of Record
J. MARK FOLEY
LAUGHLIN, FALBO, LEVY & MORESI
Two Embarcadero Center,
Fifth Floor
San Francisco, California 94111
(415) 781-6676

Attorneys for Amicus Curiae